RECENT ENGLISH DECISIONS.

High Court of Justice. Exchequer Division.

CROWHURST v. THE AMERSHAM BURIAL BOARD.

If a man knowingly plant in his own land, and suffer to grow over the land of his neighbor a noxious tree, by which his neighbor's cattle are injured, an action will lie against him at the suit of such neighbor.

THIS was an appeal by way of special case, from the decision of the judge of the Buckinghamshire County Court in favor of the plaintiff.

The facts of the case, the arguments urged on either side, and the cases cited, appear from the judgment of the court.

J. O. Griffits, Q. C., and *Cooper Wyld*, for the plaintiff.

Herschell, Q. C., and *Shaw*, for the defendants.

The judgment of the court was delivered by

KELLY, C. B.—This is an appeal from the County Court of Buckinghamshire, held at Chesham. The judgment in the court below was for the plaintiff, damages 21*l.*, and the judge stated a case for our opinion.

The material facts of this case are as follows: The defendants, some seventeen years ago, obtained a piece of land for the purpose of their cemetery, and fenced it around with a dwarf wall, in which at two places there were openings filled up with iron railings about two feet high. Where these railings occurred, the defendants planted two yew trees, at a distance of about four feet from the railing. These grew through and beyond the railings, so as to project over an adjoining meadow.

The plaintiff, two years before the alleged cause of action, hired this meadow to pasture his horses, for a term of three years. After the plaintiff had occupied the field for two years, his horse, which was feeding in the meadow, ate of that portion of the yew tree which projected over the field—the wall and rails not being sufficiently high to prevent a horse from so eating, and died from the effects of the poison contained in what he ate

The question for our determination is, whether the death of the horse so occasioned, afforded any cause of action against the defendants.

There being no pleading in the county court, the question is not in any way affected by the form in which the cause of action is put

forward, and the facts as found by the judge of the county court must be taken as conclusive. The only matter, therefore, for our decision is, whether upon these facts any legal liability is disclosed.

The matter might appear to be somewhat trivial, but the case gives rise to a question which may not unfrequently arise, and therefore is of some general importance. Considering this, it is remarkable that there is an absence of any immediate authority by which our decision should be governed, and it is, therefore, necessary to determine what are the principles of law properly applicable to it.

Before doing this, it may be well to state shortly what I apprehend to be the effect of the finding of the county court judge. In the first place, I consider that the judge has so found the facts as to the planting and growth of the yew trees as to preclude the supposition of mere accident, and that the trees must be taken so to have been planted and grown with the knowledge of the defendants as to make them responsible for whatever might be the direct consequence of the original planting.

Secondly, although it is found that the plaintiff saw the horse in the meadow the day before it died, it is also found that he was not aware of the existence of the yew trees, and I think it must be taken that any such negligence on the part of the plaintiff as would disentitle him to recover is negatived. The mere fact that the plaintiff saw the horse in the field would go for nothing, and I do not think that he was bound to examine all the boundaries so as to see that no tree likely to be injurious to his horse was projecting over the field he had hired.

It ought also to be noticed that the decision in no way depends upon any question of fencing or the correlative rights and duties arising therefrom, and therefore the cases which were cited to us based upon these afford us no assistance.

The question seems to resolve itself into this: was the act of the defendants in originally planting the tree, or the omission to keep it within their own boundary, a legal wrong against the occupiers of the adjoining field, which, when damage arose from it, would give the latter a cause of action?

On the part of the defendants it may be said that the planting of a yew tree in or near to a fence, and permitting it to grow in its natural course, is so usual and ordinary that a court of law ought not to decide that it can be made the subject of an action, especially

when an adjoining landowner, over whose property it grew, would, according to the authorities, have the remedy in his own hands by clipping.

On the other hand, the plaintiff may fairly argue that what was done was a curtailment of his rights, which, had he known of it, would prevent his using the field for the purpose for which he had hired it, or would impose upon him the unusual burden of tethering or watching his cattle, or of trimming the trees in question, and although the right so to trim may be conceded, this does not dispose of the case, as the watching to see where trimming would be necessary and the operation of trimming are burdens which ought not to be cast upon a neighbor by the acts of an adjoining owner. It may also be said that if the tree were innocuous, it might well be held, from grounds of general convenience, that the occupier of the land projected over would have no right of action, but should be left to protect himself by clipping. Such projections are innumerable throughout the country, and no such action has ever been maintained; but the occupier ought, from similar grounds of general convenience, to be allowed to turn out his cattle, acting upon the assumption that none but innocuous trees are permitted to project over his land.

The principle by which such a case is to be governed, is carefully expressed in the judgment of the Exchequer Chamber in *Fletcher* v. *Rylands*, Law Rep. 1 Ex. 265, 279, where it is said: "We think that the true rule of law is, that the person who for his own purposes brings on his lands—and collects and keeps there—anything that is likely to do mischief, if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." This statement of the law was cited and approved of in the judgment of the House of Lords in the same case.

In *Fletcher* v. *Rylands*, the act of the defendant complained of was the collecting in a reservoir a large quantity of water, which burst its bounds and flowed into the plaintiff's mine; but though the degree of caution required may vary in each particular case, the principle upon which the duty depends must be the same, and it has been applied under many and varied circumstances of a more ordinary kind, as in *Aldred's Case*, 9 Rep. 57 *b*, where the wrong complained of was the building of a house for hogs so near to the plaintiff's premises, as to be a nuisance; the laying of dung so high

as to damage a neighbor: *Tenant* v. *Goldwin*, 1 Salk. 360; and others which are cited in Comyn's Digest, tit. "Action on the case for Nuisance;" and in the judgment in *Fletcher* v. *Rylands;* in all which cases the maxim, "*Sic utere tuo ut alienum non lædas,*" was considered to apply, and those who so interfered with the enjoyment by their neighbors of their premises, were held liable.

Other cases of a similar kind may be found in the books. Thus in *Turbervil* v. *Stamp*, 1 Salk. 13, it was held that an action lay by one whose corn was burnt by the negligent management of a fire upon his neighbor's ground, although one of the judges did not agree in the decision, upon the ground that it was usual for farmers to burn stubble. In *Lambert* v. *Bessy*, Sir T. Raym. 421, the action was in trespass *quare clausum fregit.* The defendant pleaded that he had land adjoining the plaintiff's close, and upon it a hedge of thorns; that he cut the thorns, and that they *ipso invito* fell upon the plaintiff's land, and the defendant took them off as soon as he could. On demurrer, judgment was given for the plaintiff, on the ground that, though a man do a lawful thing, yet if any damage befalls another, he shall be answerable if he could have avoided it.

This case was alluded to and approved of by Lord CRANWORTH, in his judgment in the case of *Rylands* v. *Fletcher*, in the House of Lords, Law Rep. 3 H. L. 330; where he says: "The doctrine is founded on good sense. For when one person in managing his own affairs causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer."

It does not appear from the case what evidence was given in the county court, to prove either that the defendants knew that yew trees were poisonous to cattle, or that the fact was common knowledge amongst persons who have to do with cattle. As to the defendants' knowledge it would be immaterial, as whether they knew it or not they must be held responsible for the natural consequences of their own act. It is, however, distinctly found by the judge: "The fact that cattle frequently browse on the leaves and branches of yew trees when within reach, and not unfrequently are poisoned thereby, is generally known," and by this finding, which certainly is in accordance with experience, we are bound.

Several cases were cited during the argument. In two of them, *Lawrence* v. *Jenkins*, Law Rep. 8 Q. B. 274, and *Firth* v. *Bow-*

ling Iron Co., Law Rep. 3 C. P. Div. 254; the liability of the defendant was based upon his duty to fence. These, therefore, as I have already said, throw no light upon the present question. In *Wilson* v. *Newbury*, Law Rep. 7 Q. B. 31, which arose upon demurrer to a declaration, the court merely decided that an averment that clippings from the defendant's yew tree got upon the plaintiff's land, was insufficient, without showing that they were placed there by or with the knowledge of the defendant. Mr. Justice MELLOR, however, in giving judgment says, after alluding to *Fletcher* v. *Rylands:* "If a person brings on to his land things which have a tendency to escape, and to do mischief, he must take care that they do not get on his neighbor's land."

Another case which was cited during the argument was that of *Erskine* v. *Adeane*, Law Rep. 8 Ch. 756, in which the Court of Appeal held that a warranty could not be implied by the lessor of land let for agricultural purposes; that there were no plants likely to be injurious to cattle, such as yew trees, growing on the premises demised. This decision obviously rests upon grounds foreign to those by which the present case should be determined. I notice it, therefore, only that I may not appear to have overlooked it.

In the result I think that the judgment of the county court was correct, and that it should be affirmed with costs.

This is rather a novel application of the doctrine *sic utere tuo*, &c. The more common analogous instances are those of injuries by the escape of domestic animals, of fire, water, or building materials, and such like.

The most difficult question in such cases always is, when is it necessary to prove actual negligence in the defendant, in order to create a liability; and

1. As to *Animals*. It was doubtless the common law that an owner of cattle is liable for damages they may do to the crops of another, if they escape, even without any negligence on his part. He was bound to keep them at home at his peril. See *Ellis* v. *Loftus Iron Co.*, Law Rep. 10 C. P. 10, for a modern illustration of the familiar doctrine. It being the natural disposition of animals to wander away, and stray on to the lands of other people, and there consume their grass and crops, the owner was held chargeable with knowledge of that natural disposition, and so liable, without proof of other negligence than merely allowing them to trespass. Besides, such entering upon another's lands was a trespass, whether in man or beast, and without any regard to the intention or negligence of the defendants: *Lee* v. *Riley*, 18 C. B. N. S. 722; *Decker* v. *Gammon*, 44 Me. 322; *Dolph* v. *Ferris*, 7 W. & S. 367; *Van Leuven* v. *Lyke*, 1 Comst. 515; *Angus* v. *Radin*, 2 South. 815; *Dunckle* v. *Kocker*, 11 Barb. 387. Possibly this might not apply so strictly to dogs, cats and such animals. See 17 C. B. N. S. 260, a very interesting case.

2. As to *Fires*. There is good authority for saying that the ancient law, or rather custom of England, appears to have been that a person in whose *house*

a fire originated, either by himself or his servants, and which afterwards spread to his neighbor's property and destroyed it, must make good the loss; and apparently without other proof of negligence. See 1 Ph. Ch. Rep. 316; Roll. Ab., *Action on the case*, B., tit. *Fire*; Bac. Ab., *Action on the case*. Otherwise there would have been little necessity for the statute, 6 Ann. c. 31, § 6, passed in 1707, which enacted that after a future day no action should be maintained against any person in whose "house or chamber" any fire should accidentally begin, nor should any recompense be made by such person for any damage suffered or occasioned thereby. This was subsequently extended so as to include any fire accidentally begun in any one's "stable, barn or other building, or estate:" st. 12 Geo. 3, c. 73, and 14 Geo. 3, c. 78. See also st. 7 & 8 Vict. c. 84, s. 1; the word "estate" clearly applying to land not built upon, and making the owner of such land not liable in the same manner as it previously had the owner of buildings. Since those statutes, therefore, it has always been held necessary in England to allege and prove some negligence on the part of the defendant or his servants, in order to charge him; and if that exists, he is liable. See *Vaughan* v. *Menlove*, 3 Bing. N. C. 468; 4 Scott 244 (1837); *Filliter* v. *Phippard*, 11 Q. B. 347 (1847). A fire cannot be "accidentally" begun, which arises from the defendant's negligence: *Webb* v. *Rome, &c., Railroad Co.*, 49 N. Y. 420 (1872).

And it has been held that those early English statutes form a part of the common law of this country: *Lansing* v. *Stone*, 37 Barb. 15 (1862); *Spaulding* v. *C. & N. Railroad Co.*, 30 Wis. 110. But whether that be so or not, and whatever the common law of England may have at one time been, it seems to be uniformly established in this country, that if one kindles a fire on his own premises, for a lawful purpose, as for domestic indoor purposes, or to burn brush, fallow, &c., in the field, he is not liable for its escape, unless some negligence be actually proved, the burden of establishing which being on the plaintiff, as it is the very gist of his action. See *Clark* v. *Fort*, 8 Johns. 421; *Stuart* v. *Hawley*, 22 Barb. 619; *Calkins* v. *Barger*, 44 Id. 424; *Tourtellott* v. *Rosebrook*, 11 Met. 460; *Bachelder* v. *Heagan*, 18 Me. 32; *De France* v. *Spencer*, 2 Iowa 462; *Fuhn* v. *Reichart*, 8 Wis. 255; *Averitt* v. *Murrell*, 4 Jones (N. C.) 323; *Hanlan* v. *Ingram*, 3 Iowa 81. It may be different if he kindles a fire without a right to do so; negligence might not be necessary in such cases. See *Jones* v. *Festiniog Railway Co.*, Law Rep. 3 Q. B. 733.

On the same principle it was held by the Supreme Court of Pennsylvania in *Raydare* v. *Knight*, 2 W. N. C. 713 (1875), that where the oil in a tank on the defendant's premises accidentally caught fire, and overflowed on to the plaintiff's adjoining land and consumed his buildings, the defendant was liable, if the jury found he was guilty of negligence in keeping his tank uncovered and running his engine with wood, whereby sparks were emitted from his engine-house to the tank.

3. As to *injuries by escape of water*. Ever since the celebrated case of *Rylands* v. *Fletcher*, even if not before, it has been the received law of England, that one who collects and retains water on his premises by any *artificial* means, and in larger quantities than nature would furnish, is, *prima facie*, ordinarily liable, if such water escape and injure others, and without other proof of negligence than the mere escape.

One of the earliest applications of the doctrine was in *Tenant* v. *Goldwin*, 1 Salk. 360; 2 Ld. Raym. 1089; in which it was held that if the defendant had a privy near the plaintiff's land, and was bound by law to keep the wall in repair,

but for want thereof filth soaked through into the plaintiff's premises, he was liable, for he was bound to keep his filth at home. *Ball* v. *Nye*, 99 Mass. 582 (1868), is very similar and decided the same way; and see *Hodgkinson* v. *Ennor*, 4 B. & S. 229; *Humphries* v. *Cousins*, Law Rep. 2 C. P. Div. 239.

This distinction as to non-liability for escape of water which falls *naturally* upon the defendant's land, and escapes *naturally* therefrom, and as to liability for that which is *artificially* accumulated, or brought into the defendant's land, was fully established in the well-considered cases in the Common Pleas of *Smith* v. *Kenrick*, 7 C. B. 515 (1849), and *Baird* v. *Williamson*, 15 C. B. N. S. 376 (1863). See also, *Smith* v. *Fletcher*, Law Rep. 7 Ex. 305 (1872).

The recent case of *Hardman* v. *North Eastern Railway Co.*, 3 C. P. Div. 168 (1878), furnishes an interesting application of this rule. The plaintiff owned a dwelling-house adjoining a railway, and separated from it by a wall built and maintained by the company. They had piled up heaps of dirt and rubbish against this wall, and the rain falling on it percolated through the wall and injured the plaintiff's house adjoining, dampening the walls and paper thereon, &c. It being alleged to have been negligently and improperly deposited by the defendants, the Court of Appeal decided that a good cause of action was set forth in the declaration, and they said the piling up the rubbish must be considered an "artificial structure," within the rule of *Fletcher* v. *Rylands*. And see *Broder* v. *Saillard*, 2 Ch. Div. 700.

The rule laid down in *Rylands* v. *Fletcher*, was dissented from in *Brown* v. *Collins*, 53 N. H. 442 (1873), although the decision did not *necessarily* involve exactly the same point: but it was fully approved in the well-reasoned case of *Cahill* v. *Eastman*, 18 Minn. 324 (1872), holding that a party is liable for the natural and necessary consequences of his acts on his own land, without regard to his care and skill in conducting them. See also, *Selden* v. *Delaware & Hudson Canal Co.*, 24 Barb. 362.

Rylands v. *Fletcher* was also questioned in *Losee* v. *Buchanan*, 51 N. Y. 487, and said to be in direct conflict with the law as settled in this country, and it was there decided that if a steam-boiler on the defendant's premises explodes, and pieces thereof are thrown on to the plaintiff's adjoining premises, and destroys his property, the defendant is not liable without proof of negligence; but the case did not necessarily decide that the negligence must be proved *aliunde* from the fact itself. See 57 N. Y. 567, DWIGHT, C. On the other hand, in *Pixley* v. *Clark*, 35 N. Y. 520, it was held that the owner of an artificial pond was liable to an adjacent owner, into whose lands the water percolated under the surface, and without any proof of negligence. And see *Wilson* v. *New Bedford*, 108 Mass. 261, though this case was under a statute.

But whether one who artificially collects and stores water on his premises, is or is not liable for its escape, without proof of some negligence, all agree, even the English courts, that if the escape is due to the act of God, *vis major*, as an *extraordinary* freshet, which could not reasonably be anticipated, the owner is not liable, if guilty of no negligence. *Nichols* v. *Marsland*, 2 Ex. Div. 1; affirming s. c. in Law Rep. 10 Ex. 255, a very important case; and limiting the application of *Fletcher* v. *Rylands*, and holding that *vis major*, or the act of some third person, which the owner had no reason to anticipate, may sometimes excuse him from responsibility. See *Mahoney* v. *Libbey*, 123 Mass. 22 and 23; *Gorham* v. *Gross*, 125 Mass. 238.

4. As to *fall of building material and the like.* The owner of a building adjoining a highway, is *prima facie* liable, if the building falls and injures a passer-by.

From the happening of the accident, in the absence of sufficient explanatory circumstances, some kind of negligence may well be presumed, and unless explained, may well be held to create a liability. *Mullen* v. *St. John*, 57 N. Y. 567 (1874). And see *Kearney* v. *London, &c., Railroad Co.*, Law Rep. 5 Q. B. 411; affirmed in the Ex. Ch., 6 Q. B. 759 (1878); *Byrne* v. *Bradle*, 2 H. & C. 722; *Scott* v. *London Dock Co.*, 3 H. & C. 596.

So, in *Shipley* v. *Fifty Associates*, 106 Mass. 104 (1870), it was held, following *Fletcher* v. *Rylands*, that if a person maintains a building on his land, with a roof so constructed, that snow and ice collecting on it from natural causes, will naturally and probably fall into the adjoining highway, he is liable, without other proof of negligence, to a person injured on the highway by such fall of snow, without fault on his part. See also *Gorham* v. *Gross*, 125 Mass. 238 (1878). So, if a person, in blasting rocks on his own land, causes fragments thereof to be thrown on to the land and buildings of another, he is liable, without any other proof of negligence, if that be necessary, than the act itself: *Hay* v. *Cohoes Co.*, 2 Comst. 159, 163.

The principle involved in this case of *Crowhurst* v. *The Amersham Burial Board*, seems to have governed a very recent case in the Common Pleas decisions, which was not apparently cited. There the plaintiff and defendant owned adjoining lands, separated by a wire fence which the defendant erected, and was bound to maintain. From long exposure, the strands of the wires composing the ropes of the fence decayed, and pieces of it fell to the ground on the plaintiff's side, and lay hidden in the grass. The plaintiff's cow, lawfully grazing there, swallowed a piece of the wire about eight inches long, and died in consequence. The defendant was held liable for the value of the cow: *Firth* v. *Bowling Iron Co.*, 3 C. P. Div. 254 (1878). And see *Humphries* v. *Cousins*, C. P. Div. 239.

In view of the somewhat conflicting opinions on this subject, it seems safe to say that the precise limits of the doctrine of *sic utere tuo ut alienum non lædas*, may not yet be definitely determined.

EDMUND H. BENNETT.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

B. F. SAUSSER *v.* DANIEL STEINMETZ.

A parol agreement to lease for more than three years being within the Statute of Frauds, it is not a fraud for one party to refuse to execute it.

An action lies for the breach of such agreement, but the damages recoverable are such only as result directly from the breach. Nothing can be recovered for the loss of the bargain, nor is the rent named in the proposed lease admissible as a measure of the damages.

In the absence of evidence that the lessor was prevented from leasing to another person, and no claim being made for money expended in improvements or repairs, made specially necessary by the proposed lease, his damages must be merely nominal.

THIS was an action brought by the lessor defendant in error, for the breach of a parol contract to lease a store for five years. The special count of the declaration alleged the agreement to lease; the alterations and improvement of the premises by the plaintiff